92-782

No.

Supreme Court, U.S.
FILED
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IN THE

UNITED STATES SUPREME COURT
October Term, 1992

JOANNE M. WESTON,
Petitioner,
vs.

ROBERT R. and FEROL M. RODRIGUEZ;
AND
FRANKLIN S. CIBULA, A Law Corporation,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO PETITION

JoAnne M. Weston
414 Chestnut Street
Mount Shasta, CA 96067
(916) 926-4021 or 4410
Petitioner in pro per

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

(Entered July 2, 1992)*

In re:

Weston v. Rodriguez _____/ Case No. 90-16501
D.C. CV 88-1441 MLS

Appeal from U.S. District Court,

Eastern District of California;

and

Weston v. Cibula _____/ Case No. 91-15360
BAP EC 89-1604 MeAsJ

Appeal from the Ninth Circuit

Bankruptcy Appellate Panel

(Consolidated by the Court of Appeals)

BEFORE: NORRIS, BEEZER, and LEAVY, Cir. Judges

(Submitted on December 13, 1991)**

In these consolidated pro se appeals Joanne Weston ("Debtor") argues, inter alia, that the district court erred by affirming the bankruptcy court's approval of a settle-

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* ~~Not suitable for~~ publication.

** Submitted without oral argument.

ment agreement she entered into with the creditors who had foreclosed on her properties during the pendency of her first appeal to the Bankruptcy Appellate Panel ("BAP"), and that the BAP erred by affirming the bankruptcy court's refusal to set aside a state court default judgment obtained by her former attorney, Frank Cibula ("Cibula"), within ten days of the bankruptcy court's dismissal of her first Chapter 11 filing. Because we adopt the careful analyses of the bankruptcy and district courts set out in their well reasoned opinions, Weston v. Cibula (In re Weston I), 101 Bankr. 202 (Bankr. E.D. Cal. 1989), aff'd, 123 Bankr. 466 (Bankr. 9th Cir. 1991); and Weston v. Rodriquez (In re Weston II), 110 Bankr. 452 (E.D. Cal. 1989), and because we find no merit to any of Debtor's remaining arguments, the decisions appealed from are hereby

AFFIRMED.

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

In re:	No. 285-00957-D-11
JOANNE M. WESTON,	Motion No. HSM-1
Debtor.	ORDER DENYING RELIEF FROM AUTOMATIC STAY
_____/	

(Entered on December 17, 1985)

The motion of movants Robert R. Rodriguez and Ferol M. Rodriguez for, inter alia, relief from automatic stay was heard on December 2, 1985, in the above entitled court. After hearing the evidence and the arguments of counsel the court filed findings of fact and conclusions of law, in accordance with which it is

ORDERED, ADJUDGED AND DECREED that the automatic stay of § 362(a) of the Bankruptcy Code shall remain in full force and effect as to movants Robert R. Rodriguez and Ferol M. Rodriguez, and that the Motion for Relief from Automatic Stay of said movants is denied.

Dated: 12/16/1985 Judge Loren S. Dahl

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re	BAP No. EC 86-1214
JOANNE M. WESTON,	Bank. No. 285-00957-D-11
Debtor/Appellant.	CONDITIONAL ORDER OF DISMISSAL

(Entered on February 26, 1987)

Before: Calvin K. Ashland, Bank. Judge

It appears from the file in this appeal that a Trustee's Sale was held on February 24, 1986, following an order to dismiss the debtor's Chapter 11 petition. Therefore, it appears that this appeal may be moot. It is hereby

ORDERED that the Appellant provide a written explanation within 20 days from the date of this order to show cause why this appeal should not be dismissed as moot. Please submit an original and three copies, and proof of service on opposing counsel, of the response to this order.

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re	BAP No. EC 86-1214
JOANNE M. WESTON,	Bank. No. 285-00957-D-11
Debtor/Appellant.	ORDER
_____/	

(Entered April 9, 1987)

Before: Mooreman and Meyers, Bank. Judges

The February 26, 1987, Conditional Order of Dismissal is hereby

WITHDRAWN.

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re

JOANNE M. WESTON,
Debtor/Appellant.
_____/

BAP No. EC 86-1214

MEMORANDUM

(Filed May 20, 1988)

Before: MEYERS, ASHLAND and JONES,
Bankruptcy Judges

This is an appeal from the trial court's sua sponte dismissal of Debtor-Appellant Joanne M. Weston's ("Weston") Chapter 11 case. The trial court dismissed the filing after Weston was unsuccessful at filing disclosure statements and a plan which complied with the requirements of the Bankruptcy Code ("Code"). We REVERSE the trial court.

We begin by noting that this appeal is timely. The Appellant's motion for reconsideration, although not authorized by

name in the Bankruptcy Rules, is properly considered a motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e), which is made applicable to bankruptcy proceedings by Bankruptcy Rule 9023. See In re Curry and Sorensen, Inc., 57 B.R. 824 (9th Cir. BAP 1986). Rule 59(e) requires a movant to serve the motion "not later than 10 days after entry of the judgment." This appeal is from an underlying judgment entered on January 14, 1986. The proof of service attached to the Appellant's motion to reconsider indicates that on January 17, 1986 the motion was served by mail. The motion was timely under Rule 59(e) and Bankruptcy Rule 9023 and, therefore, the motion tolled the time to file the notice of appeal under Bankruptcy Rule 9023.

Section 1112(b) indicates that the court may only dismiss or convert a case

on application from an interested party. 11 U.S.C. § 1112(b) (Supp IV 186)[1]; see In re Moog, 774 F.2d 1073, 1079 (11th Cir. 1985); In re Warner, 30 B.R. 528, 529 (9th Cir. BAP 1983). In this case, application was made by the estate administrator. The estate administrator is not an interested party. See In re Gusam Restaurant Corp., 737 F.2d 274, 275 n.1 (2nd Cir. 1984). The trial court's dismissal was, therefore, not authorized by section 1112(b) and must be vacated.

The order dismissing the underlying case is VACATED and the case is REMANDED for proceedings consistent with this decision.

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[1]Recent amendments to the Code have affected the application of § 1112(b) by specifically allowing the court to act sua sponte whether or not the Code requires application by a party in interest. (Citations omitted) The change in the Code was not effective at the time of this dismissal or the filing of the notice of appeal. (Citations omitted)

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

In re:	Case No. 285-00957-B-11
JOANNE M. WESTON, dba Weston Enter.,	Motion No. JMW-8
vs.	(To reconsider Court's Intended Decision on Motion No. JMW-6)
FRANKLIN S. CIBULA, a Law Corporation./	ORDER DENYING MOTION

(Entered April 27, 1989)

[Published, 101 B.R. 202 (1989)]

The following relevant and material facts are undisputed by the parties for the purpose of this motion. In February 1983 Joanne M. Weston (hereinafter "Debtor") hired Franklin S. Cibula, a law corporation (hereinafter "Cibula"), as legal counsel to assist her in resolving certain disputes. The Debtor subsequently became suspicious of Cibula's conduct and ultimately terminated his employment sometime in December of 1984. On February 19, 1985, Cibula served Debtor with a complaint ("Complaint")

for attorney's fees which was pending in the Municipal Court of Redding in Shasta County, California. Debtor subsequently filed a voluntary Chapter 11 petition in bankruptcy with this court March 15, 1985.

An order dismissing the case due to an unreasonable delay by the Debtor to propose a Plan was entered by this court on January 14, 1986 and notice of the dismissal was mailed on the same day to the Debtor and her creditors. Although properly notified of the court's order to dismiss her case, Debtor never moved for a stay pending appeal as provided for in Bankruptcy Rule ("B.R.") 8005. On January 15, 1985, Cibula filed for and received a default judgment against Debtor in the above referenced Municipal Court of Redding. Cibula also filed an attachment lien against a cause of action and judgment being pursued by the Debtor in the Siskiyou County Superior Court on January 15, 1986.

Debtor subsequently filed a motion requesting this court to reconsider its order of dismissal on January 28, 1986. That motion having been denied on February 27, 1986, the Debtor filed an appeal with the Ninth Circuit Bankruptcy Appellate Panel ("BAP") on March 5, 1986. The BAP eventually overturned this court's order to dismiss on May 20, 1988[1] and an Order Reopening Case was subsequently filed on July 18, 1988.

ISSUE

The pertinent issue before this court is whether Cibula's recovery of a judgment against the Debtor and attachment of the judgment lien against her property within ten days of the entry of the order to dismiss her Chapter 11 case violated the ten day stay against enforcing judgments imposed by B.R. 7062.

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[1] The BAP found this court's dismissal was unauthorized by 11 U.S.C. § 1112(b) because the application to dismiss was made by the estate administrator rather than an "interested party" as required by that section.

ANALYSIS

In its original order, this court relied upon the reasoning set forth in In re De Jesus Saez 721 F.2d 848 (1st Cir. 1983) for the proposition that the automatic stay lifts immediately upon the effective date of an order of dismissal rather than, as the Debtor herein suggests, after the expiration of the ten day period prescribed by Federal Rule of Civil Procedure ("F.R. Civ.P.") 62(a)[2] (made applicable by B.R. 7062[3]).

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[2]F.R.Civ.P. 62 provides in pertinent part as follows:"(a) Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal."

[3]B.R. 7062 provides as follows: "Rule 62 F.R. Civ.P. applies in adversary proceedings except that an order granting relief from an automatic stay provided by §362, §922, or §1101 of the Code, an order authorizing or prohibiting the use of cash collateral or property of the estate under §363, and an order authorizing the trustee to obtain credit pursuant to §364 shall be additional exceptions to Rule 62(a)."

The facts in Saez are substantially similar to those now before this court for reconsideration. In that case the bankruptcy court granted a creditor's motion to dismiss the Debtor's Chapter 13 petition for "failure to prosecute" the bankruptcy on May 11, 1981. (721 F.2d 848, 850). Despite the fact that the Debtor filed a motion for reconsideration on May 13, 1981, a previously scheduled auction of the Debtor's residence took place the following day.

The bankruptcy court subsequently granted the motion for reconsideration and held, inter alia, that although the automatic stay "unquestionably...ceased to protect the debtor" against the acts of creditors upon the dismissal of the case (citing 11 U.S.C. § 362(e)(2)[4] (sic)), the creditors

[4]Although there once was a §362(e)(2) under the Bankruptcy Code, reference to that section in the context of the issue being discussed makes no sense. The court was undoubtedly referring to 11 U.S.C. ¶362(c)(2) [quoted text omitted].

were nonetheless in violation of Bankruptcy Act Rule 762 (now B.R. 7062) as the public sale of the Debtor's property occurred within ten days of the order dismissing the case. (In re Saez 13 B.R. 605, 606-07 (Bkrtcy.D.P.R. 1981)). The bankruptcy court concluded that the sale of the Debtor's property was "null and void and without legal effect". (Supra, at 607).

The Court of Appeals subsequently reversed the bankruptcy court's decision. Although it agreed that unless extended by Rule 762 or in some other manner the automatic stay "plainly terminates upon dismissal of the petition giving rise to it" (citing 11 U.S.C. §362(c)), it found that Rule 762 did not apply to an order dismissing a case for failure to diligently prosecute the bankruptcy case. In reaching the latter proposition, the court reasoned that although Rule 762 applied to adversary proceedings as well as to "all proceedings

related to a contested petition and in all proceedings to vacate an adjudication" (Referring to the express language of Bankruptcy Act Rule 121[5], now B.R. 1018), a simple order to dismiss for failure to prosecute did not qualify as either, Consequently, the court found that Rule 762 did not govern such a proceeding.[6]

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[5]Rule 121 provided in pertinent part that "Except as otherwise provided in Part I of these rules and unless the court otherwise directs, the following rules in Part VII apply in all proceedings relating to a contested petition and in all proceedings to vacate an adjudication; Rules ... 762 ... For the purpose of this rule a reference in the rules in Part VII to adversary proceedings shall be read as a reference to proceedings relating to a contested petition or proceedings to vacate an adjudication ...."

[6]Specifically, the court found that "... the dismissal did not arise from a contest over de Jesus's eligibility for chapter 13 relief or the like. Rather, de Jesus's petition was dismissed simply for her failure to prosecute her case in a diligent manner. Under these circumstances, the rules did not require creditors to delay further from exercising their pre-petition rights." (721 F.2d 848, 852).

Although there might have been some question as to whether a motion to dismiss a bankruptcy petition for want of prosecution was either a contested matter or a "proceeding related to a contested petition" under the Bankruptcy Act, the modified rules promulgated under the Bankruptcy Reform Act of 1978 and in effect at all relevant times for the purpose of this motion specifically provided that "[a] proceeding to dismiss a case or convert a case to another chapter is governed by Rule 9014". (B.R. 1017(d)[7]). Thus, because Rule 9014 governs "contested matters"[8], the natural interpretation of Rule 1017(d) as it existed on the date of dismissal of the instant case is that all proceedings to dismiss or convert a case were intended to constitute "contested" proceedings.

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[7]Rule 1017(d) was subsequently amended in 1987 to provide that dismissals or conversions pursuant to §§706(a), 707(b), 1112(a), and 1307(b) would not

Because the Debtor's petition was dismissed by this court pursuant to 11 U.S.C. §1112(b)[9], and because such a proceeding was governed by B.R. 9014, this court must agree with the Debtor that the proceeding to dismiss Debtor's petition constituted a

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automatically be characterized as a contested matter under Rule 9014. Rather, conversion or dismissal under those sections would be governed by Rule 9013 which does not require a hearing absent court order.

[8]Rule 9014 provides in relevant part as follows:

"In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought ... The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply; ... 7062 ...."

[9]§ 1112(b) provides in pertinent part:

§ 1112. Conversion or dismissal.

(b) Except as provided in subsection (c) of this section [inapplicable to this analysis], on request of a party in interest or the United States trustee, and after notice and a hearing, the court may ... dismiss a case under this chapter, ... for cause, including - (3) unreasonable delay by the debtor that is prejudicial to creditors;

(4) failure to propose a plan under section 1121 of this title within any time fixed by the court[.]

"contested matter" under that Rule. Despite the fact that B.R. 7062 is made expressly applicable to contested matters by Rule 9014, however, this court cannot accept the Debtor's conclusion that B.R. 7062 was intended to apply specifically to B.R. 1017(d) dismissal orders.

As a preliminary matter, this court agrees with the Saez court's analysis of the effect of an order of dismissal upon the automatic stay; namely, that the automatic stay is immediately terminated (11 U.S.C. §362(c)(2)(B)) at the moment the order dismissing the case is entered on the docket (B.R. 9021 [incorporating F.R. Civ.P 58]). (Supra, 721 F.2d at 851). This court furthermore agrees that this interpretation jibes with the provisions of 11 U.S.C. §349(b)[10] which defines the

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[10] §349(b) provides in pertinent part:
(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title [inapplicable to this analysis] -

effect of an order of dismissal. Thus, the plain language of both of the above referenced code provisions serves to contradict the Debtor's suggestion that B.R. 7062 was designed to prevent the automatic stay from lifting immediately upon the dismissal of the case.

Furthermore, F.R.Civ.P. 62(a) (upon which B.R. 7062(a) was expressly based)

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(1) reinstates -
(A) any proceeding or custodianship superseded under section 543 of this title;
(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and
(C) any lien voided under section 506(d) of this title;
(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550 or 553 of this title; and
(3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

The Legislative history defines the "basic purpose" of subsection (b) as one of "undo[ing] the bankruptcy case, as far as practicable, and restor-[ing] all property rights to the position in which they were found at the commencement of the case." (H.R. Rep. No. 95-595, 95th Cong., 1st Sess 337=38 (1977); S.Rep. No. 95-989, 95th Cong.. 2d Sess 48-49 (1978)).

does not purport to stay proceedings which do not involve the enforcement of a judgment. (11 Wright and Miller, Federal Practice and Procedure, §2901). Rather, Rule 62(a) was designed to carve an exception to the general rule that a court's judgment becomes effective and, consequently, enforceable when the order is entered on the docket by prohibiting creditors from enforcing certain judgments for a period of ten days following the effective date of the order. Clearly such an exception is superfluous in the context of an order dismissing a complaint as such a judgment generally eliminates a cause of action rather than rendering one enforceable.

Consequently, unable to discern any express or implied manifestations of intent that B.R. 7062 was designed to enlarge the limited application of F.R.Civ.P. 62(a) as described above, this court must find that the ten day stay within those rules

was not intended to apply to orders involving the dismissal of bankruptcy petitions without a contrary order of the court. Therefore, because no stay was imposed by Rule 7062, and because the Debtor never secured a stay pending appeal, Cibula was free to pursue his state court remedies with complete immunity immediately upon the effective date of the dismissal.[11] (See In re Lashley, 825 F.2d 362 (11th Cir. 1987) (bankruptcy court could not retroactively void foreclosure sale to enable Chapter 13 debtors to pursue appeal in absence of stay pending appeal); Norton v.

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[11]Debtor's assertions that this court is bound by comments made on the record and in findings of fact in unrelated proceedings within her bankruptcy case is without merit. The doctrine of "the law of case" applies only to rulings made by an appellate court and does not apply to rulings by the trial court. (5B C.J.S. Appeal and Error, §1821 (citations omitted)). In any event, the statements rendered by this court regarding the effect of an order of dismissal upon the automatic stay were pure dicta and, because they were made in the context of an unrelated motion and between unrelated parties, the doctrines of res judicata and collateral estoppel would not apply.

Hoxie State Bank, 61 B.R. 258 (Bkrtcy.D. Kan. 1986) (in accord); Matter of Bluford, 40 B.R. 640 (Bkrtcy.W.D. Mo. 1984) (automatic stay does not remain in effect for ten days following dismissal of Chapter 13 petition); In re Linton, 35 B.R. 695 (Bkrtcy.D.Idaho 1983) (perfection of security interest in collateral within 10 days of order dismissing Chapter 13 case held enforceable); In re Weatherfield Farms,Inc., 34 B.R. 435 (Bkrtcy.D.Vt. 1983) (absent order staying dismissal of Chapter 11 case, stay terminated upon dismissal and mortgagee was restored to position it assumed at the commencement of the case); Contra In re Cooper, 16 B.R. 19 (Bkrtcy.W.D.Mo. 1981) (repossession and sale of automobile within 10 days of dismissal constituted a violation of stay); But c.f. In re Krueger, 88 B.R. 238 (9th Cir. BAP 1988) (stay held to remain in effect thereby rendering foreclosure sale void where dismissal order

was issued in violation of debtors' right to due process)[12].

DISPOSITION

The above discussion shall constitute this court's findings of fact and conclusions of law. Consistent with the above analysis, it is hereby

ORDERED that the Debtor's motion for reconsideration be and is hereby DENIED.

Dated April 21, 1989 /s/ David E. Russell

Judge, United States Bankruptcy Court

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[12]Debtor's contention that Krueger is binding on this court under the facts of this case must be rejected. Krueger stands for the proposition that an order issued in violation of a debtor's constitutional rights to notice may properly be rendered void. As the Debtor does not allege any violation of her rights to due process, the exception delineated in Krueger does not apply. (In re Krueger, supra, 88 B.R. 238).

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

In re:

JOANNE M. WESTON, CIV S-88-1441-MLS

Appellant,

vs.

ROBERT & FEROL RODRIGUEZ, MEMORANDUM OF DECISION AND ORDER

Appellees.

_____/

(Entered December 12, 1989)

[Published, 110 B.R. 452 (E.D. Cal. 1989)]

This case is before the court on debtor's appeal from orders of the United States Bankruptcy Court, Eastern District of California in Bank. Case No. 286-05445-B-11. Appellant is Joanne M. Weston appearing in propria persona. Appellees are Robert and Ferol Rodriguez appearing in propria persona.

Appellant seeks review of orders of the bankruptcy court on a number of grounds which are enumerated below. Prior to the

hearing on the appeal, the court ordered the matter submitted on the papers pursuant to Local Rule 230(h). The court, having considered the arguments in the papers submitted on this appeal, now renders its decision.

I. **FACTUAL AND PROCEDURAL BACKGROUND**

In January, 1980, appellees loaned $80,000 to appellant. The loan was secured by appellant's real property. Later, the parties filed several actions in state court including a foreclosure action by appellees.

On March 15, 1985, appellant filed a Chapter 11 bankruptcy case ("Weston Bankruptcy I"). On January 14, 1986 the bankruptcy court, sua sponte, entered an order dismissing Weston Bankruptcy I. No stay of this order was obtained, although appellant moved for reconsideration; the motion was taken under submission on February 19 and subsequently denied on February 27. In the meantime, on February 24, appellees proceeded

with foreclosure sales in state court pursuant to the dismissal order, and thereby obtained title to the two real property parcels in question.

On March 3, 1986 appellant filed a notice of appeal of the order dismissing Weston Bankruptcy I but did not obtain a stay pending appeal. On May 20, 1988 the Bankruptcy Appellate Panel ("BAP") reversed the bankruptcy court's dismissal and reinstated Weston Bankruptcy I.

While Weston Bankruptcy I was on appeal, appellant filed a second bankruptcy case)"Weston Bankruptcy II") on October 24, 1986. The court lifted the automatic stay so that appellees could proceed with an unlawful detainer action on the property to which they had gained title by foreclosure. Appellant appealed the order lifting stay.

On January 12, 1988 appellant and appellees entered into a settlement agreement in which appellees quitclaimed to appellant

their interest in appellant's home and appellant quitclaimed to appellees her interest in the commercial property.[1] In addition, appellant agreed to dismiss two pending state court actions and agreed to withdraw a lis pendens in order to wind up all proceedings. Appellees agreed to dismiss a cross-complaint in the state court action and to withdraw their opposition to appellant's bankruptcy action. Appellees fully complied with the settlement agreement including quitclaiming to appellant their interest in appellant's home. Appellant has made several attempts to rescind and unwind the settlement agreement, including challenging the approval of the settlement on numerous grounds in the instant appeal.

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[1] Appellant did not have any interest in the commercial property since appellees had obtained title to the property by foreclosure but appellees apparently thought it prudent to request a quitclaim of any interest that appellant might claim.

On May 24, 1988 appellant filed a lis pendens on the commercial property to which appellees had received title by the foreclosure action. On June 8, the bankruptcy court granted appellees' motion to expunge the lis pendens. On June 9, appellant filed another lis pendens on the commercial property. On June 28, the court granted appellees' motion to expunge the second lis pendens.

Meanwhile, appellant filed a motion for an order vacating the order approving the settlement and compromise. The bankruptcy court denied appellant's motion on September 13, 1988 and found that the settlement agreement was fair and equitable in all respects and binding on all parties and that to the extent the settlement agreement dealt with real property, it was appellees' real property and not subject to the bankruptcy court's jurisdiction. Appellant then appealed this decision. When appellees

objected to the appeal to BAP, the appeal was transferred to this court.

This court issued two orders in this case after transfer here. First, appellees were originally represented by John Bessey of Hefner, Stark and Marois. On August 11, 1989 this court granted the motion of Hefner, Stark & Marois to be relieved as counsel of record. Second, appellant's ex-parte motion to stay proceedings in the underlying bankruptcy cases pending this court's review of her appeal was denied because appellant failed to show that the estate would be irreparably injured if a stay was not granted.

Appellant alleges on appeal that:

1) Appellees' motion for approval of compromise and settlement was not brought in compliance with Bankruptcy Rule 9019;

2) The bankruptcy court disregarded the debtor/appellant's notice of rescission and her opposition when it granted the motion for approval of compromise and

settlement;

3) The bankruptcy court improperly granted appellees' motion for approval of compromise and settlement;

4) The bankruptcy court abused judicial procedure by failing to analyze whether the settlement was in the estate's best interest;;

5) The bankruptcy court did not have jurisdiction to consider the motion for approval of compromise and settlement because an appeal was pending before BAP;

6) The bankruptcy court did not have jurisdiction to grant the motion to expunge the lis pendens;

7) The creditors/appellees' "clear violations of the stay provisions" were ignored by the bankruptcy court;

8) The bankruptcy court could not issue an order relating to the real property because it did not have jurisdiction;

9) The bankruptcy judge improperly issued orders without submitting proposed

findings and conclusions to the district court for de novo review;

10) The bankruptcy court disregarded the legal effect of a motion to amend or alter judgment under F.R.Civ.P. 59(e) throughout the proceedings;

11) The bankruptcy court did not have the power to expunge the filed lis pendens on the property since the property was still part of the estate pursuant to appellant's theory that the automatic stay did not terminate;

12) The bankruptcy judge abused his discretion by saying that the lis pendens filing was "not only improper but perhaps contemptuous misconduct"; and

13) The bankruptcy judge's statement as set forth above was threatening and therefore the statement violated her due process rights.

II. STANDARD OF REVIEW

An appellate court reviews a bankruptcy

court's conclusions of law de novo, and it reviews the bankruptcy court's findings of fact under the clearly erroneous standard. In re Comer, 723 F.2d 737, 739 (9th Cir. 1984). The bankruptcy court's order approving a trustee's application to compromise a controversy is reviewed for an abuse of discretion. In re A&C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986).

III. DISCUSSION

A. The Automatic Stay Terminated upon Dismissal.

Although not emphasized in appellant's statement of issues, a key issue in these appeals is whether appellees' foreclosure on the real property which secured a loan from appellees to appellant violated the automatic stay. Appellant's argument appears to be that the automatic stay of Weston Bankruptcy I continued during the time she was appealing the dismissal since the dismissal was reversed and the case was

reinstated. She appears to argue that the dismissal was null and void and therefore the automatic stay never lapsed. However, appellant cites no authority for this.

The issue of whether the automatic stay is effective between the time of dismissal of a bankruptcy case and the granting of a reversal on appeal appears to be a question of first impression in the Ninth Circuit. However, one circuit and other courts have addressed the issue.

The Bankruptcy Code provides for an automatic stay of proceedings until the earlier of the time the case is closed or the case is dismissed. 11 U.S.C. § 362(c)(2)-(3). The Code states that the effect of a case dismissal is to revest the property of the estate in the entity in which the property was vested immediately before the commencement of the case under this title. 11 U.S.C. § 349(b)(3). The legislative body intended that this

BEST AVAIL

provis[illegible] 'undo the bankruptcy case, as far as pr[illegible] able, and restore all property right[illegible] the position in which they were found[illegible] e commencement of the case." H.R. R[illegible]. 95-595, 95th Cong., 1st Sess. 338 ([illegible]; S. Rep. No. 95-989, 95th Cong., 2d Se[illegible]-49 (1978), reprinted in 1978 U.S. C[illegible]ong. & Admin. News, 5787, 5835, 6294. [illegible]over, the bankruptcy rules provide [illegible] debtor can obtain a stay pending a[illegible] !! U.S.C. Rule 8005.

T[illegible]gislative history and structure of th[illegible] indicates that dismissal of a case [illegible] terminate the automatic stay. The c[illegible]s say that a dismissal is intende[illegible]put the parties in the place in which [illegible] were before the bankruptcy case was f[illegible] Moreover, since the drafters inclu[illegible]ovisions for a stay pending appea[illegible] Code's structure indicates that [illegible]rafters considered that certain decis[illegible] were final. Therefore, the

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drafters wanted to provide the debtor with a method of forestalling the effects of a final decision by allowing the debtor a stay pending appeal.

In In re De Jesus Saez, 721 F.2d 848 (1st Cir. 1983), the court addressed a factual situation similar to the one in this case. On May 11, 1981 the bankruptcy court dismissed the debtor's Chapter 13 petition for failure to prosecute the bankruptcy. On May 13, the debtor filed a motion for reconsideration. Despite the motion for reconsideration, a previously scheduled auction of the debtor's residence took place. The bankruptcy court later granted the motion for reconsideration and held that the sale was in violation of the ten-day period provided in Bankruptcy Rule 762[2]. The Court of Appeals reversed and held that

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2 Bankruptcy Rule 762 is substantially similar to, and has been replaced by Bankruptcy Rule 7062. Rule 7062 states that Rule 62 of the Federal Rules

automatic stay plainly terminates upon dismissal of the petition giving rise to the stay. In re De Jesus Saez, 721 F.2d at 851.

Similarly, in our case appellant's bankruptcy case was dismissed. Appellant did not obtain a stay pending appeal. Appellees proceeded with their foreclosure action. Therefore, as in In re De Jesus saez, the foreclosure action did not violate the automatic stay because the stay was not in effect at the time the foreclosure took place.

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of Civil Procedure applies in bankruptcy cases." Rule 62 provides in pertinent part:

(a) Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters of patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal.

The tax court addressed the issue of when an order of dismissal terminates a bankruptcy case's automatic stay provision for proceedings before the tax court. Olson v. Commissioner, 86 T.C. 1314 (1986). The petitioners argued that their bankruptcy petition was not dismissed until their appeal was denied and therefore the automatic stay was in effect during the appeal. The court held that "absent any order pursuant to Rule 8005, R.B.P., staying the dismissal, the automatic stay terminates upon dismissal." Olson, 86 T.C. at 1318. The court said that the automatic stay is an impermanent "breathing spell" that terminates on dismissal of the case. Id. Accordingly, the Bankruptcy Code reflects this basic rule by requiring that a party obtain a stay pending appeal of a judgment of the bankruptcy court. Id.

The Tax court's discussion supports the argument that the Bankruptcy Code's

structure suggests an intent that a dismissal be final -- thus terminating the automatic stay -- because the Code provides the debtor with a procedure to suspend the effect of a final decision. In our case, appellant's case was dismissed and the automatic stay terminated. Although Bankruptcy Rule 8005 allows a party to seek a stay pending appeal, appellant did not avail herself of this provision and, therefore, the foreclosure sale did not violate the automatic stay. If there are deficiencies in the foreclosure sale itself, her remedies would be in state court.

The Ninth Circuit BAP touched on this issue once in In re Krueger, 88 B.R. 238 (9th Cir. BAP 1988). There, the debtor filed amendments to the bankruptcy plan but was not present at the confirmation hearing. The trustee did not notify the debtor that he would object to the amendments. The court continued the hearing

and instructed the creditor to notify the debtor of the continuance. The creditor failed to notify the debtor of the continuance and the case was dismissed on the trustee's motion for failure to amend the plan as requested. Soon after the dismissal the creditor held a sale of the security. BAP held that the original order dismissing the case was void[3] because it was in violation of the debtor-appellant's due process rights to notice. In re Krueger, 88 B.R. at 241. Futhermore, BAP held that because the original order dismissing the case was void, the stay was in effect continuously from the date the petition was filed. Id.

The Krueger case is distinguishable from the instant action. In our case, the bankruptcy judge held a hearing on his order

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3 The BAP concluded that the order dismissing the case was void for lack of due process. In the instant case, the order dismissing Weston Bankruptcy I was not void for lack of due process.

to show cause why the case should not be dismissed on December 2, 1985. Therefore, appellant was given notice and a hearing before the case was dismissed. This is not a case where appellant was denied an opportunity to be heard before the dismissal. Appellant knew the case was dismissed and filed a motion for reconsideration soon after the dismissal. Appellant could have availed herself of the provision for a stay pending appeal. Moreover, appellant does not allege due process violations with respect to the dismissal order nor are any uncovered upon review of the case. Therefore, the instant case is distinguishable and Krueger does not apply.

As a result of the foregoing analysis, the court concludes that the automatic stay terminated upon dismissal of Weston Bankruptcy I, and the subsequent foreclosure sale by appellees was not in violation of the automatic stay.

B. Real Property Issues are Moot.

The general rule is that an appeal is moot when an appellant has failed to obtain a stay from an order that permits a sale of a debtor's assets. In re Onouli-Kona Land Co., 846 F.2d 1170, 1171 (9th Cir. 1988). This rule developed from: (1) the general rule that an occurrence of events which prevent an appellate court from granting effective relief renders an appeal moot; and (2) the particular need for finality in orders regarding stays in bankruptcy. In re Onouli-Kona Land Co., 846 F.2d at 1172 (quoting Algeran Inc v. Advance Ross Corp., 759 F.2d 1421, 1424 (9th Cir. 1985)).

There are two exceptions where the general rule is inapplicable. First, there is a narrow exception to the general rule when real property is sold to a creditor who is a party to the appeal and the sale is subject to statutory rights of redemption. In re Onouli-Kona Land Co., 846 F.2d at 1173.

In the present case the property was sold nonjudicially and therefore it is not subject to the statutory right of redemption.[4] Therefore, this exception is inapplicable.

Second, the mootness rule operates only when the purchaser bought an asset in good faith. Id. Lack of good faith is defined as "fraud, collusion ... or an attempt to take grossly unfair advantage of other bidders." Id. Appellant does not allege that appellees did not act in good faith but rather she alleges that they clearly violated the stay provision. This allegation seems to be premised on the argument that the automatic stay was still in effect,

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4 The parties do not state nor do they argue that the foreclosure was a judicial foreclosure subject to the statutory right of redemption. However, the record indicates that the sale was by nonjudicial foreclosure because: 1) appellant did not attempt to exercise her statutory right of redemption; 2) there is no record of a court appointed commissioner selling the property in accordance with California Code of Civil Procedure § 726; and 3) there is no record of appellees having sought a deficiency judgment from appellant.

whereas, as discussed above, the automatic stay was terminated. Because appellant does not allege that the purchase was not in good faith, and because there is no evidence that appellees acted with a lack of good faith, the mootness rule controls.

The bankruptcy court entered an order dismissing the case. The dismissal order permitted appellant's property to be sold by non-judicial foreclosure and sold when there was no stay in effect, the property was not part of the estate. Therefore, assuming arguendo that appellant's arguments have merit, the matters relating to the real property are moot because the real property was sold when no stay was in effect. Consequently, this court is unable to grant appellant effective relief.

C. The Bankruptcy Court had Jurisdiction to Approve the Settlement and Compromise Agreement

The bankruptcy court issued an order granting appellees' motion for approval of

compromise and settlement on March 29, 1988. Appellant argues that the bankruptcy court did not have jurisdiction to grant the motion because of her pending appeal of the dismissal of Weston Bankruptcy I. As discussed above, the real property was not property of the estate and the bankruptcy court did not have jurisdiction over the real property. However, the debtor had two actions pending in state court. These state causes of action were property of the estate, and therefore we must consider whether the bankruptcy court had jurisdiction to approve the settlement or compromise.

A trial court is generally divested of jurisdiction when a matter is on appeal unless the decision is a collateral matter such as the expungement of a lis pendens. In re Thatcher, 24 B.R. 764, 766 (Bankr. E.D. Cal. 1982). The order approving the settlement and compromise in the instant case was issued on March 29, 1988. At that

time appellant's appeal of the dismissal of Weston Bankruptcy I was still pending. Weston Bankruptcy I was not reinstated and consolidated with Weston Bankruptcy II until May 20, 1988. Weston Bankruptcy II was still pending in the bankruptcy court at the time the motion for approval of the settlement and compromise agreement was brought before the bankruptcy court. Therefore, insofar as the court approved the compromise of state causes of action which were property of the estate, the court had jurisdiction to approve the compromise.

D. The Bankruptcy Court's Approval of the Settlement was not an Abuse of Discretion.

A bankruptcy court's order approving an application to compromise a controversy is reviewed for an abuse of discretion. In re A & C Properties, 784 F.2d at 1381. The settlement must be reasonable, given the particular circumstances of the case. Id. (citing In re Equity Funding Corporation of

America, 519 F.2d 1274, 1277 (9th Cir. 1975)). The court must find that the compromise is fair and equitable. Id. When making this determination the court must consider the following factors:

> (a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988).

In the present case, the bankruptcy court issued an order granting an approval of the compromise and settlement on March 29, 1988. The primary assets of the estate were claims against various parties. Because appellant's real property had been foreclosed and sold at a time when no stay was in effect, the property previously owned by appellant was not property of the estate.

The bankruptcy court made findings of fact and conclusions of law in its denial of appellant's Motion for an Order Vacating the Order Approving the Settlement and Compromise in its order entered September 13, 1988. These findings of fact and conclusions of law should be sufficient to establish a record for review of the approval of the settlement since these findings detail the factors considered in upholding the original approval.

First, in making its factual determinations, the bankruptcy court considered that appellant agreed to dismiss two pending state court actions and agreed to withdraw a lis pendens in both cases in order to wind up all proceedings. Second, the court considered that appellees agreed to dismiss a cross-complaint in the state court action and to withdraw their opposition to appellant's bankruptcy action.[5] Third,

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[5] Appellees also had an unlawful detainer action against appellant pending in state court. The

the court also considered that the real property had been foreclosed by appellees at a time when there was no stay in effect. Fourth, the court considered the numerous proceedings that were before the court. Fifth, the court noted that appellees, as part of the settlement agreement, would quitclaim their interest in appellant's home (to which appellees had received title in the foreclosure action). Finally, in reaching its conclusion of law, the bankruptcy court found that the settlement agreement was fair and equitable.

Based on the record, there is sufficient evidence to support a conclusion that the settlement agreement was fair and equitable and in the best interests of the estate. The bankruptcy case embodied

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parties agreed to stipulate to a judgment in favor of appellees, granting them possession of the commercial property in accordance with the parties' agreement that appellees would be given a quitclaim deed to the commercial property.

a three-year-old controversy with numerous proceedings before the court. Appellees agreed to: (1) quitclaim to appellant their ownership interest in appellant's home which they had received by foreclosure; and (2) forego state actions against appellant. In exchange, appellant agreed to forego state actions against appellees. Considering all of the circumstances surrounding the controversy, a conclusion that the settlement was fair and equitable was a reasonable conclusion by the bankruptcy court; therefore, it cannot be said that the bankruptcy court abused its discretion.

E. The Bankruptcy Court had Jurisdiction to Expunge Debtor's Lis Pendens.

Generally, once a matter is appealed, the trial court loses jurisdiction to rule on matters before the appellate court. See Griggs v. Provident Consumer Discount Co., 459 U.S. 58, 59, 103 S.Ct. 400, 402, 74 L. Ed.2d 225 (1982). However, the issue of

expunging a lis pendens is collateral to issues determined in the underlying action and does not fall within the limitation on jurisdiction when an appeal has been taken. In re Thatcher, 24 B.R. 764, 766 (Bankr. E.D. Cal. 1982). Therefore, the bankruptcy court had jurisdiction to expunge the lis pendens recorded by appellant because the lis pendens was collateral to the matters on appeal.

As discussed above, the real property was not property of the estate because it had been foreclosed at a time when no stay was in effect. Therefore, the bankruptcy court's order expunging appellant's lis pendens should not be disturbed. Moreover, a lis pendens may be issued by

> the clerk, or the judge if there is no clerk ... or an attorney of record in the action may sign and issue a notice of pendency of action, or the person causing the notice of pendency of the action to be recorded may obtain certification from the court in which the action is pending that an action concerning real property or affecting the title or the right of possession

> of real property has been filed between the named parties.

Cal. Civ. Proc. Code § 409. Appellant is not an attorney and therefore could not be the "attorney of record". The code provides that a person may request the court to issue a notice of pendency of action or the person may obtain a certification of the pendency of action. In the instant action, appellant did not request the court to issue a notice of pendency of action nor did appellant obtain certification from the court.

The court may expunge a lis pendens on motion of an interested party unless the party recording the lis pendens

> shows to the satisfaction of the court, by a preponderance of the evidence, that ... the action does affect title to or right of possession of the real property described in the notice.

Cal. Civ. Proc. Code § 409.1. A trial court's decision to expunge a lis pendens is reviewed for an abuse of discretion. Mason v. Superior Court, 163 Cal. App. 3d 989, 994

(1985); see also Malcom v. Superior Court, 29 Cal. 3d 518, 521 (1981). It cannot be said that the bankruptcy court abused its discretion when it granted appellees' motion to expunge the lis pendens since the real property was no longer property of the estate and, therefore, there was not an action pending relating to the property. Moreover, appellant did not follow prescribed procedure in recording the lis pendens. See McKnight v. Superior Court, 170 Cal. App. 3d 291, 304 (1985).

Appellant also contends that the bankruptcy judge abused his discretionary powers when he wrote in his order denying appellant's motion to vacate the expungement that the recording of the lis pendens was "not only improper, but perhaps contemptuous misconduct." Appellant charges that this comment was an attempt to intimidate her and in violation of her due process rights. These charges are meritless

and do not warrant discussion.

Accordingly, the court concluc

1. That the automatic stay te: ted upon dismissal of Weston Bankrupt and the subsequent foreclosure sale o: pel- lant's property was not in violat of the automatic stay;

2. That matters on appeal rel to the real property are moot becaus real property was sold when no stay wa effect and this court is unable to grant lant effective relief;

3. That the bankruptcy court uris- diction to approve the settlement com- promise agreement between appella d appellees because Weston Bankrupt was still pending when the motion for oval was brought before the bankruptcy t;

4. That the bankruptcy court ot abuse its discretion when, consid the circumstances surrounding the cor ersy, it approved the settlement agreem and

BEST AVAIL

5. That expungement of a lis pendens is collateral to issues determined in the underlying action and therefore the bankruptcy court had jurisdiction to expunge appellant's lis pendens.

As a consequence of the foregoing, the orders of the bankruptcy court are affirmed.

IT IS SO ORDERED.

Dated: December 12, 1989

/s/ Milton L. Schwartz

United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

In re:

JOANNE M. WESTON,
Appellant, CIV S-88-1441-MLS

vs.

ROBERT & FEROL RODRIGUEZ,
Appellees. ORDER
[On Rehearing]
_____/

(Entered August 28, 1990)

Debtor and appellant, Joanne M. Weston, seeks reconsideration of this court's order of December 12, 1989 affirming orders entered by the bankruptcy court in the above-captioned bankruptcy case.

I? **BACKGROUND**

In January, 1980, appellees loaned $80,000 to appellant. The loan was secured by two parcels of real property owned by appellant. Later, the parties filed several actions in state court, including a foreclosure action brought by appellees.

On March 15, 1985, appellant filed for

relief in bankruptcy under Chapter 11 ("Weston I"). On January 14, 1986, the bankruptcy court entered a sua sponte order dismissing the bankruptcy case. Appellant moved for reconsideration by the bankruptcy court, although she did not seek a stay of its dismissal order. The motion for reconsideration was taken under submission on February 19 and subsequently denied on February 27. Meanwhile, appellees proceeded with a foreclosure sale in state court pursuant to the dismissal order. The foreclosure sale took place on February 24, and appellees obtained title to the two parcels in question.

On March 3, 1986, appellant filed a notice of appeal of the order dismissing the bankruptcy case. She did not obtain a stay pending appeal. On May 20, 1988, the Bankruptcy Appellate Panel ("BAP") reversed the bankruptcy court's dismissal and reinstated the bankruptcy case.

Meanwhile, while Weston I was on appeal, appellant filed a second bankruptcy case ("Weston II") on October 24, 1986. The bankruptcy court lifted the automatic stay so that appellees could proceed with an unlawful detainer action against appellant on the property to which they had gained title by foreclosure. Appellant appealed the order lifting the stay.

Then, on January 12, 1988, appellant and appellees entered into a settlement agreement by which appellees quitclaimed to appellant their interest in the residential property involved in the foreclosure and appellant quitclaimed to appellees her interest in the commercial property involved in the foreclosure. In addition, appellant agreed to dismiss two pending state court actions and agreed to withdraw a notice of lis pendens. Appellees agreed to dismiss a cross-complaint and to withdraw their opposition to

appellant's bankruptcy action. Although appellees fully complied with their obligations under the settlement agreement, appellant made several attempts to rescind it, including a challenge to the bankruptcy court's approval of the settlement agreement via an appeal to this court.

On May 24, 1988, appellant filed a notice of lis pendens on the commercial property to which appellees had received title through the foreclosure sale. After the bankruptcy court granted appellees' motion to expunge the lis pendens on June 8, appellant filed another notice of lis pendens on the property on June 9. On June 28, the bankruptcy court granted appellees' motion to expunge the second lis pendens.

Meanwhile, appellant petitioned the bankruptcy court to vacate its order approving the settlement and compromise. In denying this motion, the bankruptcy

court concluded that the agreement was fair and equitable and binding on all parties, and that to the extent that the agreement dealt with real property, it was appellees' real property and, therefore, the property was not subject to the bankruptcy court's jurisdiction. Thereafter, appellant appealed this decision.

Utimately, appellant raised the following issues in her appeal from various determinations by the bankruptcy court: 1) appellees' motion for approval of compromise and settlement was not brought in compliance with Bankruptcy Rule 9019; 2) the bankruptcy court disregarded appellant's notice of rescission and her opposition when it granted the motion for approval of compromise and settlement; 3) the bankruptcy court improperly granted appellees' motion for approval of compromise and settlement; 4) the bankruptcy court abused judicial procedure by failing

to analyze whether the settlement was in the estate's best interest; 5) the bankruptcy court did not have jurisdiction to consider the motion for approval of compromise and settlement because an appeal was pending before BAP; 6) the bankruptcy court did not have jurisdiction to grant the motions to expunge lis pendens; 7) appellees' "clear violations of the stay provisions" were ignored by the bankruptcy court; 8) the bankruptcy court could not issue an order relating to the real property because it did not have jurisdiction; 9) the bankruptcy judge improperly issued orders without submitting proposed findings and conclusions to the district court for de novo review; 10) the bankruptcy court disregarded the legal effect of a motion to amend or alter judgment under F.R.Civ.P. 59(e) throughout the proceedings; 11) the bankruptcy court did not have the power to expunge the filed lis pendens on the property

since the property was still part of the estate pursuant to appellant's theory that the automatic stay did not terminate; 12) the bankruptcy judge abused his discretion by saying that the lis pendens filing was "not only improper, but perhaps contemptuous misconduct"; and 13) the bankruptcy judge's statement as set forth above was threatening and therefore the statement violated her due process rights.

In affirming the decisions of the bankruptcy court challenged by appellant, this court concluded in its order of December 12, 1989 that: 10 the automatic stay terminated upon dismissal of Weston I, and the subsequent foreclosure sale of appellant's property was therefore not in violation of the automatic stay; 2) matters on appeal relating to the real property were moot because the real property was sold when no stay was in effect and this court was unable to grant appellant

effective relief; 3) the bankruptcy court had jurisdiction to approve the settlement and compromise agreement between appellant and appellees because Weston II was still pending when the motion for approval was brought before the bankruptcy court; 4) the bankruptcy court did not abuse its discretion when, considering the circumstances surrounding the controversy, it approved the settlement and compromise agreement; and 5) expungement of a lis pendens is collateral to issues determined in the underlying action and therefore the bankruptcy court had jurisdiction to expunge appellant's lis pendens.

Appellant now moves for reconsideration on the following grounds: 1) the court misconstrued appellant's contentions about the validity of appellees' foreclosure sale; 2) issues regarding the real property are not moot because the foreclosure sales were not valid, and furthermore, the matter is

governed by the doctrine of "law of the case"; 3) the bankruptcy court was divested of jurisdiction to hear the motion for approval of compromise in Weston II because an appeal was pending before BAP that dealt with issues regarding valid title to the property and claims against appellees based on the foreclosure sales; 4) the bankruptcy court also used improper procedure when it approved the compromise; 5) this court was in error when it said the bankruptcy court had jurisdiction to expunge the lis pendens; and 6) the court did not address the following issues raised by appellant in her appeal: a) only a trustee can bring a motion to approve a compromise under Bankruptcy Rule 9019; b) appellees violated the stay provisions of Bankruptcy Rule 7062 when they recorded settlement documents within three days of the entry of the bankruptcy court's order approving settlement; c) a non-Article III judge

cannot issue a non-appealable order such as the order expunging lis pendens; and d) this court did not consider the effect of a timely Rule 59(e) motion on either the dismissal of the first bankruptcy case or the order approving settlement.

II. **ANALYSIS**

A motion for reconsideration is proper where the moving party can show new or different facts or circumstances not existing or not shown previously or can establish other grounds for the motion.

The issues appellant raises in her request for reconsideration are, for the most part, a reiteration of the arguments she presented during the court's original determination of her appeal. However, one issue warrants reconsideration because, although the court believes it implicitly decided the issue, it was not directly addressed in the court's previous order.

Appellant contends that this court

misconstrued the theory under which she was challenging the validity of the appellees' foreclosure sale. She states that she was not contending that the automatic stay in Weston I continued during the time of her appeal because the initial dismissal was null and void, and, therefore, the automatic stay never lapsed. Instead, she argues that the foreclosure sale was void because it took place while her motion for reconsideration of the bankruptcy court's sua sponte order of dismissal on January 14, 1986 was pending, and the automatic stay was consequently still effective.

As appellant rightly points out, Bankruptcy Rule 9023, dealing with post-trial motions, is derived from Rule 59(e) of Federal Rules of Civil Procedure.[1] Apellant is also correct when she says that

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[1] Bankruptcy Rule 9023 states: "Rule 59 F.R.Civ. P. applies in cases under the Code ...."

while a motion for reconsideration is pending, no appeal may be filed. However, appellant confuses doctrines developed to aid in determining when a judgment is final for purposes of appeal with those determining the finality of a judgment for other purposes.

Rule 59(e) provides that a motion to alter or amend a judgment shall be served within ten days after entry of the judgment. Bankruptcy Rule 8002(b)(3) states, in pertinent part:

> If a timely motion is filed by any party ... under Rule 9023 to alter or amend the judgment ... the time for appeal for all parties shall run from the entry of the order ... granting or denying any ... such motion.

All but one of the cases cited by appellant in support of her argument deal with the issue of when a party can file an appeal, and they hold that a timely motion for rehearing or reconsideration automatically suspends the finality of the order

for purposes of appeal. See, e.g., In re Shah, 859 F.2d 1463 (10th Cir. 1988); Creative Data Forms, Inc. v. Pennsylvania Minority Business Development Authority, 72 B.R. 619 (E.D. Pa. 1985), aff'd, 800 F.2d 1132 (3rd Cir. 1986); Gates v. Central States Teamsters Pension Fund, 788 F.2d 1341, 1343 (8th Cir. 1986); In re Curry and Sorenson, Inc., 57 B.R. 824 (9th Cir. BAP 1986). The one case that did not deal with the finality of a judgment for appeal purposes was a case involving res judicata. See Matter of Lockard, 884 F.2d 1171 (9th Cir. 1989). Because an issue previously decided by the bankruptcy court was under reconsideration by the same court, a party was not barred from litigating the same claim in another court. Id at 1180. The Lockard court itself recognized the similarity of the finality requirement for purposes of claim preclusion and the concept of finality for purposes of appellate

review. Id, citing Restatement (Second) of Judgments § 13, comment b.

After judgment is entered, there is an automatic ten-day stay of proceedings to execute or enforce a judgment. Fed.R. Civ.P. 82(a); Bankruptcy Rule 7062. Furthermore, a party who seeks reconsideration after judgment is entered has the option of seeking a stay beyond the automatic ten-day stay, pending disposition of its motion for reconsideration. Fed. R.Civ.P. 62(b); Bankruptcy Rule 7062.

When appellant's bankruptcy case was dismissed, the automatic stay terminated. See Order of December 12, 1989 at 7-12; In re De Jesus Saez, 721 F.2d 848 (1st Cir. 1983); Olson v. Commissioner, 86 T.C. 1314 (1986). Appellant did not obtain a stay pending her motion for reconsideration or a stay pending appeal. While the motion for reconsideration was pending, and after the automatic ten-day stay under

Bankruptcy Rule 7062 had run, appellees proceeded with their foreclosure sale. The foreclosure did not violate the automatic stay provided by 11 U.S.C. § 362 because that stay was not in effect at the time the foreclosure took place. Futhermore it did not violate the automatic ten-day stay after entry of judgment, provided under Bankruptcy Rule 7062, because the order dismissing Weston I was entered January 14m 1986, and the foreclosure sale did not take place until February 24.

Accordingly, based on the reasoning set forth above, IT IS ORDERED:

1. That appellant's motion for reconsideration of the court's order of December 12, 1989 is GRANTED; and

2. That the order of December 12, 1989 affirming orders of the bankruptcy court is hereby RECONFIRMED.

Dated: August 27, 1990

/s/ Milton L. Schwartz
United State District Judge

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re

JOANNE M. WESTON,
Appellant

v.

FRANKLIN S. CIBULA,
a Law Corporation,
Appellees.

_____/

BAP EC-89-1604-MeAsJ

Bk. No. 285-00957-R11
(286-05445-R11)

MEMORANDUM

(Entered January 18, 1991)

Before: MEYERS, ASHLAND and JONES,
Bankruptcy Judges

This is an appeal by a debtor from the denial of a motion for an order vacating a default judgment on the ground that it was obtained in violation of the automatic stay.

Appellee Frank S. Cibula, a Law Corporation ("Cibula"), filed suit in state court against Joanne M. Weston ("Debtor") to obtain legal fees owed. When she had six days remaining to answer the complaint, she filed bankruptcy. The bankruptcy case was dismissed sua sponte by the trial court on January 14, 1986. On January 15, 1986,

Cibula obtained a default judgment against Debtor and on January 18, 1986, he recorded a lien against her cause of action Joanne M. Weston v. Shasta Terra, Inc., et al. [No. 352856, Siskiyou County Superior Court]. The bankruptcy case was later reinstated following an appeal to the Bankruptcy Appellate Panel in which the Panel held that the dismissal was void because the motion to dismiss was not brought by a party in interest or the United States Trustee. 11 U.S.C. §1112(b). The case was reinstated on May 20, 1988 and consolidated with the Chapter 11 case which Debtor had filed on October 24, 1986, following dismissal of the original action. Debtor then moved the bankruptcy court to vacate the default judgment. That motion and subsequent motions for reconsideration were denied and this appeal followed.

The issue presented in this appeal is whether actions taken by a creditor during

the period between the improper dismissal of a bankruptcy case and its reinstatement ("gap period") should be set aside for being in violation of the automatic stay.

In an appeal involving another creditor, the Debtor presented the same arguments before the District Court for the Eastern District of California, which rejected them in In re Weston, 110 B.R. 452 (E.D. Cal. 1989) (currently pending appeal before Ninth Circuit Court of Appeals on Notice of Appeal filed September 27, 1990). See In re De Jesus Saez, 721 F.2d 848 (1st Cir. 1983). In light of the District Court decision and for the reasons stated in the excellent opinion of the trial court, In re Weston, 101 B.R. 202 (E.Cal.[sic] 1989), we reject the Debtor's arguments presented in this appeal.

AFFIRM.

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re

BAP EC-89-1604-MeAsJ

JOANNE M. WESTON,
Appellant,

Bk. No. 285-00957-R11
(286-05445-R11)

v.

FRANKLIN S. CIBULA,
a Law Corporation,

ORDER

_____/

(Entered February 13, 1991)

Before: MEYERS, ASHLAND and JONES,
Bankruptcy Judges

The Appellant's Motion For Rehearing is hereby ORDERED DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

(Entered September 1, 1992)

In re:

Weston v. Rodriguez _____/ Case No. 90-16501
D.C. CV 88-1441-MLS

and

Weston v. Cibula _____/ Case No. 91-15360
BAP EC 89-1604-MeAsJ

(Consolidated by the Court)

Before: NORRIS, BEEZER and LEAVY,
Circuit Judges

The petition for rehearing is denied.

The pertinent text of Rule 55, Federal Rules of Civil Procedure, states:

> (b)(2) ... If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application....

The pertinent text of FRBP 9019 state:

> (a) Compromise. On motion by the trustee and after a hearing on notice to creditors, the debtor and indenture trustee as provided in Rule 2002(a) and to such other persons as the court may designate, the court may approve a compromise or settlement.